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Jones Act, 46 U.S.C. App. § 688

In order to prevail on [his/her] claim under the Jones Act, [plaintiff] must establish each of the following things by a preponderance of the evidence:

First, that at the time of [his/her] injury [he/she] was acting in the course of [his/her] employment as a seaman employed by [defendant];

Second, that [defendant] was negligent; and

Third, that [defendant]’s negligence was a legal cause of the injury sustained by [plaintiff].

To be a “seaman,” [plaintiff] must have been a worker whose duties contributed to the function of a vessel or to the accomplishment of its mission; and, in addition, must have had a connection to a vessel in navigation—a connection that was substantial in terms of both its duration and its nature. The Jones Act is intended to protect sea-based maritime workers who owe their allegiance to a vessel and are regularly exposed to the perils of the sea. The Jones Act is not intended to protect land-based employees. The phrase “vessel in navigation” means any boat, ship, barge or other thing used primarily for the transportation of cargo, equipment or persons across navigable waters. The phrase “vessel in navigation” also includes anything that was actually in navigation at the time of [plaintiff]’s injury, even though its primary purpose was not navigation or commerce across navigable waters.

“Negligence” is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person [or corporation] would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful person [or corporation] would not do under similar circumstances, or in failing to do something that a reasonably careful person [or corporation] would do under similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence; the employer does not guarantee a seaman’s safety.

For purposes of a Jones Act claim, negligence is a “legal” cause of injury if it plays any part, no matter how small, in bringing about or actually causing the injury. So, if you should find from the evidence that negligence of [defendant] contributed in any way toward any injury suffered by [plaintiff], then [plaintiff]’s injury was legally caused by [defendant]’s negligence. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support [plaintiff]’s claim that [defendant]’s negligence legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]’s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was [himself/herself] negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim is upon [defendant], who must establish by a preponderance of the evidence:

First, that [plaintiff] was also negligent; and

Second, that [plaintiff]'s negligence was a legal cause of [his/her] injury.

I have already defined “negligence” and “legal cause” and the same definitions apply here.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form I will explain in a moment. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural. If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by

[plaintiff] as a result of [defendant]'s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]'s pain or impairment caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by [defendant]'s negligence, then [defendant] is liable for all [plaintiff]'s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to \$_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [defendant]'s negligence.

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries' effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [defendant]'s negligence has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of

measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Comment

(1) Jones Act recovery is available to “seamen.” 46 U.S.C. App. § 688(a) (1994). “[T]he Jones Act inquiry is fundamentally status based: Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore.” Chandris, Inc. v. Latsis, 515 U.S. 347, 361 (1995). That status is “a mixed question of law and fact.” Id. at 369; McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 356 (1991). Definition of the term is for the court, but the factual underpinnings are for the jury. McDermott, 498 U.S. at 356; Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 87-88 (1991). The definition here is based upon Chandris. There, the Supreme Court stated:

On remand, the District Court should charge the jury in a manner consistent with our holding that the “employment-related connection to a vessel in navigation” necessary to qualify as a seaman under the Jones Act comprises two basic elements: The worker’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature. As to the latter point, the court should emphasize that the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not. By instructing juries in Jones Act cases accordingly, courts can give proper effect to the remedial scheme Congress has created for injured maritime workers.

Chandris, 515 U.S. at 376-77 (citation omitted). The Court also said:

The jury should be permitted, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation to qualify as a member of the vessel’s crew, to consider all relevant circumstances bearing on the two elements outlined above.

Id. at 369. (The Court also seemed to approve a Fifth Circuit “rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act,” but the rule of thumb seems more for when to take a case away from the jury than for actually instructing the jury. Id. at 371.) After McDermott, it is no longer necessary “that a seaman aid in navigation.” 498 U.S. at 346. “It is not necessary that a seaman aid in navigation or contribute to the transportation of the

vessel, but a seaman must be doing the ship's work.” *Id.* at 355. “It is not the employee’s particular job that is determinative, but the employee’s connection to a vessel.” *Id.* at 354. A seaman can be either a master or crew member. *Id.* at 349. “‘Member of a crew’ and ‘seaman’ are closely related terms. Indeed, the two were often used interchangeably in general maritime cases.” *Id.* at 348.

(2) In Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 557 (1997), the Supreme Court made clear that if a worker is relying upon employment by a “group of . . . vessels” (Chandris’s language) to show his or her seaman status, he or she must show that the group of vessels is under common ownership or control.

(3) The definition of “vessel in navigation,” if status as a vessel in navigation is a matter of dispute, is whether the craft is “used primarily for the transportation of cargo, equipment or persons across navigable waters or was, at the time of [the] injuries, engaged in navigation.” DiGiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1123 (1st Cir. 1992) (en banc) (citing approvingly Bernard v. Binnings Constr. Co., 741 F.2d 824, 829 (5th Cir. 1984)); accord Stewart v. Dutra Constr. Co., Inc., 230 F.3d 461 (1st Cir. 2000). The question is “use,” not the “physical characteristics of the structure.” DiGiovanni, 959 F.2d at 1123. Whether a particular craft is a qualifying vessel is a question for the jury “unless the craft is clearly outside any permissible understanding of the term.” Bennett v. Perini Corp., 510 F.2d 114, 116 (1st Cir. 1975). On “navigation,” the issue is not what the vessel did in the past or its future potential. DiGiovanni, 959 F.2d at 1123. “In sum, if a barge, or other float’s ‘purpose or primary business is *not* navigation or commerce,’ then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.” *Id.* In Chandris, the Supreme Court stated:

“[A] vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside,” even when the vessel is undergoing repairs. At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation.

515 U.S. at 373-74 (citations omitted). Nevertheless, activities on a vessel during time spent in drydock not qualifying as navigation may still be “marginally relevant to the [jury’s] underlying inquiry (whether [a worker] was a seaman and not a land-based maritime employee).” *Id.* at 375-76.

(4) The Jones Act remedy is available only against the seaman’s employer. McAleer v. Smith, 57 F.3d 109, 115 (1st Cir. 1995). Usually the vessel owner is the employer, either directly or through the borrowed servant doctrine. Kukias v. Chandris Lines, Inc., 839 F.2d 860, 862 (1st Cir. 1988). “The existence of any employer-employee relationship [is] a question of fact [to] be established by plaintiff.” Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676, 681 (1st Cir. 1979). For a discussion of the factors, see Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231, 235-36 (3d Cir. 1991).

(5) The instruction does not provide a definition for “course of employment.” 46 U.S.C. App. § 688(a). In a per curiam opinion, the First Circuit has endorsed District Judge Lagueux’s conclusion that “course of employment” is narrower than “service of the ship,” the test for maintenance and cure. Colon v. Apex Marine Corp., 35 F.3d 16 (1st Cir. 1994) (per curiam), aff’d 832 F. Supp. 508 (D.R.I. 1993).

(6) Jones Act liability may be based upon the violation of a statutory duty without a finding of negligence and without regard to whether the injury in question was the sort the statutory duty sought to prevent. Kernan v. American Dredging Co., 355 U.S. 426, 432-33 (1958) (basing liability on a U.S. Coast Guard rule of navigation). “The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer’s fault. This fault may consist of a breach of the duty of care . . . or of a breach of some statutory duty.” Id. at 432; see also id. at 439.

(7) Jones Act liability may rest upon the assault of one seaman by another. The primary issue will be foreseeability. See, e.g., Connolly v. Farrell Lines, Inc., 268 F.2d 653, 655 (1st Cir. 1959); Colon v. Apex Marine Corp., 832 F. Supp. 508, 510-11 (D.R.I. 1993), aff’d, 35 F.3d 16 (1st Cir. 1994).

(8) Assumption of the risk is *not* a defense in Jones Act cases. Hopkins v. Jordan Marine, Inc., 271 F.3d 1, 3 (1st Cir. 2001). Defendants often ask for an instruction that a seaman “must assume the unavoidable risks of his occupation.” That may mean only that there is no liability for an accident that is simply a normal event of a life at sea, but it seems best to leave words like “assumption” or “assume the unavoidable risks” out of the charge.

(9) Strangely, the First Circuit still recognizes the “primary duty rule” in Jones Act cases, even though the Jones Act incorporates FELA’s provisions unaltered, see Kernan, 355 U.S. at 431, and there is no primary duty rule for FELA cases. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 63-64 (1943). The First Circuit states:

The primary duty rule provides that a ship’s officer may not recover against his employer for negligence or unseaworthiness when there is no other cause of the officer’s injuries other than the officer’s breach of his consciously assumed duty to maintain safe conditions aboard the vessel.

Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998); see also Peymann v. Perini Corp., 507 F.2d 1318, 1322-23 (1st Cir. 1974). The primary duty rule is the equivalent of a finding of no negligence on the part of the employer. Wilson, 150 F.3d at 11. The primary duty rule, however, will not bar recovery where the ship’s owner was also “independently at fault.” Id. “[A]n instruction on the primary duty rule must be given if the evidence establishes a genuine controversy as to whether [the plaintiff] owed a duty to the defendants, whether he breached the duty, and whether that breach was the *sole* proximate cause of his injury.” Id. The challenge for a trial court is to draft a primary duty instruction that does not sound like an assumption of risk instruction.

(10) Defendants often ask for a charge based upon Peymann v. Perini Corp. in addition to, or independent of, primary duty. (The Peymann discussion was on an unseaworthiness count, but it is equally pertinent to the Jones Act count.) Peymann had the following to say:

If a vessel makes available two means for performing an act, one of which is unsafe, *e.g.*, two tools, one of which is defective, or two ladders, one of which is slippery, it would be an indirect application of the proscribed doctrine of assumption of the risk to foreclose recovery completely if the seaman chose the less desirable alternative. But this does not mean that a seaman may not be wholly barred if he selects a method he could not reasonably think open to him. Thus if the cook were given a proper bottle opener but chose to knock the head off the bottle, he could not complain. Or if there were two gangways and one was marked “Do not use,” it could not be thought that a seaman insisting upon using it despite the proffered [sic] alternative could complain of the ship’s unseaworthiness. So, in the case at bar, if there was a ladder available which was the single means the engineer was supposed to use, as, indeed, his own testimony suggested, it would not be proper to hold the vessel responsible to any degree if his decision not to use it was a free choice.

507 F.2d at 1322 (citations omitted); see also Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 200 (1st Cir. 1980). But these “sole causation” charges are often very difficult to draft without sounding like assumption of risk. Thus, the First Circuit has struggled with language that said: “If you find that the plaintiff’s alleged injuries were the result of his failing to observe an obvious condition, you will find for the defendant.” Hopkins, 271 F.3d at 3. It may be safer to treat an issue like this as a comparative negligence affirmative defense. Wilson, 150 F.3d at 11 (failing to use safer alternative means to perform a task is comparative negligence and “can be a complete defense when a jury finds that the plaintiff’s own negligence was the sole proximate cause of the injuries.”).

(11) Duty and foreseeability are elements of negligence under the Jones Act. Rodway v. Amoco Shipping Co., 491 F.2d 265, 267 (1st Cir. 1974) (foreseeability and duty); Connolly, 268 F.2d at 655 (foreseeability). Duty is omitted from this instruction because duty is generally an issue for the court and, as in FELA cases, an employer is always required to exercise reasonable care for its seamen’s safety while in the course of their employment. Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 7 (1963) (analyzing duty under FELA).

(12) On causation, “[a] Jones Act defendant may be found liable if the defendant’s negligence played even the slightest part in producing the plaintiff’s injury.” Wilson, 150 F.3d at 11 n.8. The plaintiff’s burden is “featherweight.” Toucet v. Maritime Overseas Corp., 991 F.2d 5, 10 (1st Cir. 1993). This standard of causation is distinct from the standard for an unseaworthiness claim. Therefore, if a jury is dealing with both such claims, the causation distinction should be highlighted.

(13) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate “should take into account inflation and other sources of wage increases as well as the rate of interest”). Notwithstanding inflationary factors, “[t]he discount rate should be based on the rate of interest that would be earned on ‘the best and safest investments.’” Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The “best and safest investments” are those which provide a “risk-free stream of future income,” not those made by “investors who are willing to accept some risk of default.” Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate “market interest rate”).

(14) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But Jones Act damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income. Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994). Therefore, an instruction that the damage award will not be taxed is required, see Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(15) Prejudgment interest is unavailable under the Jones Act. Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991); see also Morgan, 486 U.S. at 336-39 (prejudgment interest unavailable under FELA). The First Circuit has not decided what should happen when damages are awarded on both a Jones Act and an unseaworthiness claim (where prejudgment interest is available) with no allocation between them. Borges, 935 F.2d at 443 n.1.

(16) Damages resulting from aggravation of a pre-existing injury are recoverable. Evans v. United Arab Shipping Co., 790 F. Supp. 516, 519 (D.N.J. 1992), aff’d, 4 F.3d 207 (3d Cir. 1993), cited with approval in Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 601 (1st Cir. 1996) (affirming the doctrine’s validity under FELA).

(17) A spouse and dependents of a fatally injured seaman can recover pecuniary damages for the wrongful death of a seaman, but no damages for loss of society/consortium under the Jones Act. Miles v. Apex Marine Corp., 498 U.S. 19, 32-33 (1990); Horsley v. Mobil Oil Corp., 15 F.3d 200, 201-02 (1st Cir. 1994). The seaman’s own cause of action under the Jones Act survives his or her death, but the damages for lost income, etc., are limited to the losses during his or her lifetime. Miles, 498 U.S. at 35.

(18) Punitive damages are not available in Jones Act cases. Horsley, 15 F.3d at 203.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

[PLAINTIFF]

)

)

v.

)

CIVIL No. _____

)

[DEFENDANT]

)

SPECIAL VERDICT FORM

[Jones Act Claim]

1. Do you find that [defendant] was negligent and that its negligence was a legal cause of [plaintiff]'s injuries?

Yes _____ No _____

If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

\$_____

Proceed to Question #3.

3. Was the accident caused in part by [plaintiff]'s own negligence?

Yes _____ No _____

If your answer to Question #3 is "yes," answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]'s negligence contribute to the accident?

_____%

Dated: _____, 200_

Jury Foreperson